(3)

No. 03-9685

Supreme Court, U.S.
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In the Supreme Court of the United States

ROBERT JOHNSON, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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Petition for Certiorari Filed March 22, 2004
Petition for Certiorari Granted September 28, 2004

TABLE OF CONTENTS

Page

Relevant Docket Entries . . . . . J.A. 1

Eleventh Circuit Order
Filed Dec. 22, 1995 . . . . . J.A. 7

Superior Court of Wayne County,
Georgia Order Filed Oct. 24, 2000 . . . . . J.A. 9

Report and Recommendation of the Magistrate
Judge Filed May 11, 2001 . . . . . J.A. 11

Order and Judgment of the Middle District
of Georgia Filed Aug. 1, 2001 and
Aug. 7, 2001 . . . . . J.A. 18

Eleventh Circuit Opinion and Judgment
Filed Aug. 5, 2003 . . . . . J.A. 22

Eleventh Circuit Order Denying Rehearing
En Banc Filed Dec. 22, 2003 . . . . . J.A. 48

RELEVANT DOCKET ENTRIES

United States District Court
for the Middle District of Georgia
Criminal Docket for Case No. 94-CR-7-4

1	03/18/94	SEALED INDICTMENT as to Charles Kendrick (1) count(s) 1, 3, 14, 15, 16, 18, 19; Johnny Allen (2) count(s) 1, 6, 11, 12, 15, 17, 18, 19; Lawrence Carter (3) count(s) 1, 3, 7, 13, 14, 19; Robert Johnson (4) count(s) 1, 2, 4, 9, 13, 16; Timothy Jennings (5) count(s) 1, 5, 8, 10; Terrance Kendricks (6) count(s) 1, 19 (np) [Entry date 03/22/94]
114	06/02/94	PLEA entered by Robert Johnson Jr. Court accepts plea. Guilty: Robert Johnson (4) count(s) 2 (np) [Entry date 06/06/94]
141	11/29/94	JUDGMENT as to Robert Johnson (4) count(s) 2: 188 mos impri; 5 yrs supervised release not to possess guns or dangerous weapons; urinalysis testing; unable to pay fine; $50 mandatory assessment fee (Signed by Judge Wilbur D. Owens Jr.) (np) [Entry date 12/05/94]
144	12/07/94	NOTICE OF APPEAL by Robert Johnson (4) count(s) 2 (np) [Entry date 12/12/94]

158 01/25/95 TRANSCRIPT (1 Vol) filed in case as to Robert Johnson Jr. for dates of 11/18/94; Sentencing Hearing held before WDO in Macon, GA (Ct. Rptr.: Frances Roquemore) (np) [Entry date 01/25/95]

-- 02/13/95 PRESENTENCE INVESTIGATION REPORT (Sealed) as to Robert Johnson Jr. (np) [Entry date 02/15/95]

163 02/01/96 JUDGMENT of USCA (certified copy) as to Robert Johnson Jr. Re: [144-1] appeal affirming judgment/order Robert Johnson (4) count(s) 2 (np) [Entry date 02/01/96]

169 05/01/96 ORDER as to Robert Johnson Jr., Denying Certiorari (Supreme Court, Washington, DC) (np) [Entry date 05/01/96]

173 04/25/97 MOTION by Robert Johnson Jr. to Extend Time to file 2255 Motion (np) [Entry date 05/06/97]

174 05/12/97 ORDER as to Robert Johnson Jr. denying without prejudice [173-1] motion to Extend Time to file 2255 Motion as to Robert Johnson (4) (Signed by Judge Wilbur D. Owens Jr.) (np) [Entry date 05/13/97]

180 02/15/01 MOTION by Robert Johnson Jr. to Vacate under 28 U.S.C. 2255 (7:01-CV-14-WDO) (np) [Entry date 02/15/01]

181 03/06/01 Order to Respond as to Robert Johnson Jr. re: [180-1] motion to Vacate under 28 U.S.C. 2255 (7:01-CV-14-WDO) Response due on 5/7/01 for USA; Reply to Response due 5/15/01 for Robert Johnson Jr. (np) [Entry date 03/06/01]

182 04/27/01 RESPONSE by USA as to Robert Johnson Jr. re [180-1] motion to Vacate under 28 U.S.C. 2255 (7:01-CV-14-WDO) (np) [Entry date 05/07/01]

184 05/11/01 REPORT AND RECOMMENDATIONS of Mag. Judge G. M. Faircloth as to Robert Johnson Jr. Re: to Deny [180-1] motion to Vacate under 28 U.S.C. 2255 (7:01-CV-14-WDO); Motion no longer referred Objections to R and R due by 5/29/01 for Robert Johnson, Jr. (np) [Entry date 05/11/01]

185 06/01/01 OBJECTION as to Robert Johnson Jr. Re: [184-1] report and recommendations (np) [Entry date 06/01/01]

186 08/01/01 ORDER as to Robert Johnson Jr. denying [180-1] motion to Vacate under 28 U.S.C. 2255 (7:01-CV-14-WDO) as to Robert Johnson (4) (Signed by Judge Wilber D. Owens Jr.) (np) [Entry date 08/07/01]

187 08/07/01 JUDGMENT on 2255 Motion to Vacate (7:01-CV-14-WDO) as to Robert Johnson Jr. (np) [Entry date 08/07/01]

191	10/04/01	ORDER as to Robert Johnson Jr. denying [188-1] motion for Certificate of Appealability as to Robert Johnson (4) (Signed by Judge Wilbur D. Owens Jr.) (np) [Entry date 10/04/01]
193	01/23/02	USCA Order as to Robert Johnson Jr. re: Granting Deft's Motion for Certificate of Appealability only on the issue of whether the District Court determined the deft's 2255 motion was filed untimely (np) [Entry date 01/25/02]

United States Court of Appeals for the Eleventh Circuit
Docket No. 01-14830-AA

02/14/02	Appellant's Brief Filed: Appellant-Johnson, Robert Jr. (ProSe)
02/26/02	BR10 (Notice to Appellee of Filing of Pro Se Brief) issued. cc: Johnson, Robert, Jr. To: Lynch, John Larkin
03/19/02	Appellee Brief Filed: Appellee-United States of America (Atty: John Larkin Lynch)
03/28/02	Reply Brief Filed: Appellant-Johnson, Robert Jr. (ProSe)
08/12/02	Supplemental Appellant Brief: Appellant-Johnson, Robert Jr. (Atty: Courtland L. Reichman)
--	Appellee Brief Filed: (Atty: John L. Lynch) - Suppl. brief
--	Judgment Entered
08/05/03	OPIN1 (Opinion - Issuance) issued. c: Hagen, Jessica Joan-Marie; c: Lynch, John L.; c: Pope, Benjamin Warren; c: Reichman, Courtland L.
08/28/03	Petition for Rehearing En Banc

--	Petition for Rehearing En Banc is DENIED. RB dissented from denial of rehearing en banc. (PUBLISHED)
--	Mandate Issued
01/14/04	MDT1 (Letter issuing mandate) issued. To: Gregory J. Leonard; c: Faircloth, G. Mallon; c: Hagen, Jessica Joan-Marie; c: Lynch, John L.; c: Pope, Benjamin Warren; c: Reichman, Courtland L.
03/22/04	Notice of Filing Certiorari (SC# 03-9685): (Atty: Benjamin Warren Pope)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-9402
Non-Argument Calendar

D. C. Docket No. CR-94-7-VAL-WDO

[Filed December 22, 1995]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
versus	)
ROBERT JOHNSON JR., a/k/a "Rootman", Defendant-Appellant.	)

Appeal from the United States District Court
for the Middle District of Georgia

Before TJOFLAT, Chief Judge, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

Following appellant's plea of guilty to distribution of cocaine base, the district court sentenced appellant as a career offender to a prison term of 188 months. Appellant seeks the vacation of his sentence on the ground that the district court, in concluding that he was a career offender, considered prior state court convictions that, according to appellant, were

based on guilty pleas entered by appellant without a valid waiver of his constitutional rights.

Appellant raises this objection for the first time on appeal. At sentencing, when the district court asked appellant whether he had any objections to the sentence the court imposed, he stated that he had none. Because the district court's fact findings on the career offender issue are not clearly erroneous and because our refusal to consider the objection appellant now raises would not result in manifest injustice, we do not consider whether, as appellant contends, state court convictions relied on by the district court were obtained in violation of his constitutional rights.[1]

AFFIRMED.

---

[1] We note in passing that, should appellant obtain at some future date the vacation of the state court conviction in question because they were obtained in violation of his constitutional rights, he could petition the district court under 28 U.S.C. § 2255 for the relief he now asks us to provide.

IN THE SUPERIOR COURT OF WAYNE COUNTY
STATE OF GEORGIA

CIVIL ACTION NO.: 98-CV-086
HABEAS CORPUS

[Filed October 24, 2000]

ROBERT JOHNSON, JR.	)
Petitioner,	)
	)
vs.	)
	)
THE STATE OF GEORGIA,	)
Respondent.	)
	)

ORDER

Petitioner, after being sentenced in Federal Court to an enhanced sentence because of certain state convictions, filed his Petition For Writ of Habeas Corpus alleging that his pleas in seven cases in Cook County Superior Court were not voluntary in that he did not knowingly, intelligently and voluntarily waive his right to counsel at the hearing on the entry of his guilty pleas. The cases that were challenged by Petition were numbered 83F-9, 88F-32, 88M-43, 89F-122, 90F-383, 92F-36 and 93F-148 filed in Cook County Superior Court.

Petitioner, in his Petition, filed copies of the plea petitions that accompanied the entry of his pleas. These plea petitions contained questions about his waiver of the presence and use of an attorney.

The State responded denying the allegations but have not filed any further transcripts of the hearings which would support their position.

This Court finds that the record in these cases does not show an affirmative waiver of his right to an attorney. See Clowers v. State, 272 Ga. 463 (2000) and Bazemore v. State, Georgia Supreme Court docket number S00A1100, decided October 10, 2000.

IT IS HEREBY ORDERED that Petitioner's Petition For Writ of Habeas Corpus is hereby **GRANTED** and the convictions in the above-cited cases are hereby reversed.

SO ORDERED, this 24th day of Oct., 2000.

/s/ Robert L. Scoggin
Robert L. Scoggin
Senior Judge
Superior Courts of Georgia

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

CASE NO. 7:01-CV- 14 (WDO)
28 U.S.C. § 2255

CASE NO. 7:94-CR-07 (WDO)

[Filed May 11, 2001]

ROBERT JOHNSON, JR., PETITIONER,	)
vs.	)
UNITED STATES OF AMERICA, RESPONDENT.	)

REPORT AND RECOMMENDATION

Petitioner Johnson was charged by Indictment returned in this court on March 18, 1994 with Conspiracy to Possess Cocaine Base With Intent to Distribute in violation of 21 U.S.C. § 846 i/c/w 21 U.S.C. § 841(a)(1), and with five counts of Distribution of Cocaine Base in violation of 21 U.S.C. § 841(a)(1). On June 2, 1994, in exchange for certain considerations from the Government, Petitioner entered into a Plea Agreement (Tab 113) and pled guilty to Count Two as contained in the Indictment. He was sentenced by this court on November 18, 1994 to serve 188 months imprisonment. (Tab 136.) Petitioner appealed his sentence to the Eleventh Circuit Court of Appeals where the same was affirmed on February 1, 1996. (Tab 163.) Petitioner applied to the

Supreme Court for a writ of certiorari which was denied by that Court on April 24, 1996. (Tab 169.) Almost five years thereafter, on February 13, 2001, Petitioner filed the instant Section 2255 Motion to Vacate Set Aside or Correct his sentence. (Tab 180.)

THE TIME-BAR ISSUE

The Anti-Terrorism and Effective Death Penalty Act (AEDPA) codified as part of 28 U.S.C. § 2255 became effective on April 24, 1996. The relevant portion of 28 U.S.C. § 2255 is as follows:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of-
>
> (l) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Until March of this year, 2001, the Eleventh Circuit Court of Appeals had not addressed at what point a conviction becomes final in cases where a defendant is unsuccessful on

appeal and thereafter files a petition for a writ of certiorari with the Supreme Court. In *Washington v. United States,* 2001 WL 237243 (11th Cir. 2001), the Court joined the other appellate courts which had ruled on the issue and held that such a conviction becomes final on the day the Supreme Court denies a defendant's certiorari petition, and the AEDPA's statute of limitations in light of Rule 6(a), Fed. R.Civ. P., starts the period of limitations running on the day following the Supreme Court's decision. *Id.* Therefore, the AEDPA one-year period of limitation began to run on Petitioner's right to file his Section 2255 Motion to vacate his sentence on April 24, 1996 and, unless it was tolled, would have expired on April 24, 1997. 28 U.S.C. § 2255.

The Eleventh Circuit Court of Appeals has held that the AEDPA'S one-year limitations period for motions to vacate, set aside, or correct sentences may be equitably tolled when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence. *Sandvik v. United States,* 177 F. 3d 1269, (11th Cir. 1999). *See Irwin v. Department of Veteran's Affairs,* 498 U.S. 89, 95-96, 111 S. Ct. 453, 457 (1990) "(Federal Courts) have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."

PETITIONER'S CONTENTION

What does Petitioner contend should toll the running of the one-year period of limitations before April 24, 1997 (the deadline) until he eventually filed his Motion on February 13, 2001? Petitioner asserts as his sole ground for relief in the instant petition that he suffered a *due process* violation in that his sentence was based on seven invalid prior state convictions used to categorize him as a career offender under

the Sentencing Guidelines. Petitioner appealed his sentence to the Eleventh Circuit Court of Appeals where he raised the issue of his prior state convictions as being entered uncounseled and without waiver of his constitutional rights, and therefore invalid as a basis for career offender status in his federal sentence.

The Court of Appeals, in an unpublished opinion (Tab 163), refused to consider Petitioner's objection to his sentence as raised for the first time on appeal, but added in a sole footnote:

> We note in passing that, should appellant obtain at some future date the vacation of the state court conviction in question because they were obtained in violation of his constitutional rights, he could petition the district court under 28 U.S.C. § 2255 for the relief he now asks us to provide.

[It is salient to note that the appellate court stated that Petitioner could petition the district court *under 28 U.S.C. § 2255* for the relief he sought there.]

When the sentencing court gives explicit consideration to a defendant's record of previous convictions, which are later conclusively determined to be unconstitutionally invalid, the case should be remanded to the district court for resentencing with reconsideration of the invalid prior sentences. *Tucker v. United States,* 92 U.S. 443, 92 S. Ct. 589, 590 (1972). *See Custis v. United States,* 511 U. S. 485, 114 S. Ct. 1732, 1739 ("If [defendant] is successful in attacking these state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentence."). *See United States v. Roman,* 989 F.2d 1117, 1120 (11th Cir. 1993) (en banc) (suggesting that the constitution may only require such

collateral review of uncounseled convictions). All of the foregoing authorities preceded 28 U.S.C. § 2255 as amended by the AEDPA.

Petitioner contends that the statutory one-year period within which he had to file his instant Section 2255 motion began to run from October 24, 2000, the date on which the state habeas court reversed his prior state convictions. This may be construed as a claim of newly discovered evidence by which Petitioner seeks to apply section (4) of 28 U.S.C. § 2255: "The limitation period shall run from the ... the date in which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." Petitioner may be claiming surprise.

The issue thus becomes whether Petitioner exercised due diligence in filing his state habeas corpus petition regarding the claim of invalid prior state convictions, in order to meet the time limitation for filing his Section 2255 Motion. It is evident that Petitioner was fully aware of the claimed infirmity of his prior state convictions at the time of the appeal of his sentence to the Eleventh Circuit Court of Appeals, inasmuch as that was the sole issue he raised before that court, which ruled adversely to him on February 1, 1996. He attempted to obtain a writ of certiorari on the Court of Appeals decision. That application was denied by the Supreme Court on April 24, 1996. The fact that the date of the denial of certiorari and the effective date of the AEDPA's period of limitation was the same is purely coincidental. Together they initiate the running of Petitioner's one-year limitation for the filing of his state proceeding challenging the constitutional validity of his state convictions to constitute any equitable tolling of the AEDPA 1-year period of limitation. Petitioner's *due diligence* must be measured from that date,

especially in view of the admonition from the decision of the Eleventh Circuit Court of Appeals. (Tab 163.)

Again, the relevant portion of AEDPA period of limitation is as follows:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of-
>
> (l) the date on which the judgment of conviction becomes final; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255. The records of Wayne County Superior Court show, as Petitioner alleges and exemplifies by Exhibit A attached to his Motion, that, by Order of that court, dated October 24, 2000, in Habeas Corpus Action No. 98-CV- 086, Petitioner's convictions in case Nos. 83F-9, 88F-32, 88M-43, 89F-122, 90F-383, 92F-36, and 93F-148 from Cook County Superior Court, were reversed as unconstitutionally uncounseled. However, the official records of Wayne County Superior Court, attached hereto, also disclose that Petitioner's state Habeas Corpus Action No. 98-CV-086 was not filed in that court until February 6, 1998, more than twenty-one (21) months after his sentence became final by the Supreme Court's denial of his application for writ of certiorari, and more than nine (9) months after the expiration of the 1-year AEDPA period of limitations he had to file for collateral relief in this court. Petitioner cannot make a credible argument for due diligence when he waited 21 months to file his state action as suggested to him by the Eleventh Circuit Court of Appeals. While his pleadings may be given liberal

construction, "Liberal construction does not mean liberal deadlines." *Wayne v. Jarvis,* 197 F. 3d 1098, 1104 (11th Cir. 1999). Petitioner's instant Motion to vacate his sentence cannot be said to have been filed *under* [the provisions of] *28 U.S.C. § 2255.* Petitioner's instant Motion to Vacate Set Aside or Correct his sentence is, therefore, time-barred pursuant to the provisions of the AEDPA codified in 28 U.S.C. § 2255, and should be summarily denied.

WHEREFORE, IT IS RECOMMENDED that Petitioner's Motion be DENIED. Pursuant to 28 U.S.C. § 636 (b)(1), the parties may serve and file written objections to this Recommendation with the United States District Judge, WITHIN TEN (I0) DAYS after being served with a copy hereof.

SO RECOMMENDED this 9th day of February in the year 2000.

/s/ G. MALLON FAIRCLOTH
G. MALLON FAIRCLOTH
UNITED STATES MAGISTRATE JUDGE

(Certificate of Service omitted in printing).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

CASE NO. 7:01-CV- 14 (WDO)
28 U.S.C. § 2255

CASE NO. 7:94-CR-07 (WDO)

[Filed August 1, 2001]

ROBERT JOHNSON, JR.,	)
PETITIONER,	)
	)
vs.	)
	)
UNITED STATES OF AMERICA,	)
RESPONDENT.	)
	)

ORDER

After full consideration of Petitioner's Motion to Vacate Set Aside or Correct his sentence pursuant to 28 U.S.C. § 2255, the Report and Recommendation of the Magistrate Judge, and Petitioner's Objections to the Magistrate Judge's Recommendation,

IT IS DETERMINED that Petitioner's 1994 sentence in this court became final upon denial of his application for *writ of certiorari* to the U.S. Supreme Court on April 24, 1996, and that despite his success in getting his prior state sentences set aside on October 24, 2000, the AEDPA statute of limitations of 1-year within which he had to file a timely 28 U.S.C. § 2255 Motion to Vacate Set Aside or Correct his

sentence had expired on April 24, 1997. Petitioner had taken no action to toll the statute for a period of 21 months before he filed his state habeas corpus action.

Petitioner cites *United States v. Walker,* 198 F.3d 811, (11th Cir. 1999), which is factually similar, but distinguishable in a very important matter. Walker's federal conviction was affirmed by the 11th Circuit in 1996; his petition for *certiorari* was denied in 1996. In 1997, Walker filed a §2255 motion alleging his enhanced sentence was based upon an unconstitutional state sentence. The district court dismissed Walker's 2255 motion in 1998, ruling that Walker's claim was not ripe as the state sentence had not yet been set aside. Walker filed a state habeas corpus action immediately, and, apparently without contest, the state court vacated Walker's prior state sentence. "Then Walker, pursuant to Section 2255 and Fed.R.Civ.P.60(b), moved for relief from his 1996 ACCA federal sentence, requesting that the district court vacate the enhanced sentence as one of his three state predicate convictions now had been vacated. [FN4] The district court ordered a new PSI ... re-computed without reference to the 1979 (state) conviction. It then granted walker's Section 2255 petition." *Walker,* 198 F.3d at 813.

> FN4. This was ninety-three days after the initial Section 2255 petition had been denied. Since less than one year had passed between the denial of the petition for writ of certiorari and the filing of the petition, less the time the statute was tolled when the petition was pending, the statute of limitations was not violated. 28 U.S.C. §2255.

Id. Unlike Petitioner Johnson, Walker, very clearly, filed his Section 2255 Motion within the AEDPA 1-year statute of limitations. Petitioner Johnson did nothing for 21 months after

the denial of his application for *certiōrari* to the U. S. Supreme Court. In fact, a period of almost five (5) years passed before he eventually filed his Section 2255 motion on February 13, 2001.

WHEREFORE, having found Petitioner's Motion to Vacate Set Aside or Correct his 1994 sentence to be time-barred by the statute of limitations, the Report and Recommendation of the United States Magistrate Judge is hereby, approved, adopted and made the Order of the Court. Petitioner's Objections to the Report And Recommendation filed June 1, 2001, after thorough consideration, are found to be without merit. No issues having been found requiring determination by evidentiary hearing, Petitioners' request for an evidentiary hearing is also Denied.

SO ORDERED, this 1st day of August 2001.

/s/ WILBUR D. OWENS, JR.
WILBUR D. OWENS, JR.
UNITED STATES DISTRICT JUDGE

(Certificate of Service omitted in printing).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

CASE NO. 7:94-CR-07-WDO
CASE NO: 7:01-CV-14-WDO

[Filed August 7, 2001]

ROBERT JOHNSON, JR.,	)
Petitioner	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
Respondent	)
	)

JUDGMENT

Pursuant to the order of this Court filed August 1, 2001, and for the reasons stated therein, JUDGMENT is hereby entered denying petitioner Johnson's motion for relief under 28 U.S.C. Section 2255.

This 7 day of August, 2001.

GREGORY J. LEONARD, CLERK

BY: /s/ Nora Paul
Nora Paul
Criminal Deputy Clerk

(Certificate of Service omitted in printing).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 01-14830
D.C. Docket No. 01-00014-CV-WDO-7

[Filed August 5, 2003]

ROBERT JOHNSON, JR.,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

Before BLACK, RONEY and STAPLETON*, Circuit Judges.

BLACK, Circuit Judge:

This case allows us to clarify the time limits in cases where career offenders indirectly attack their federal sentences by first collaterally attacking their prior state convictions. Federal prisoner Robert Johnson brought such an indirect attack on his federal sentence, and he now appeals the district court's denial of his § 2255 petition as untimely. We issued a certificate of appealability on the following question:

* Honorable Walter K. Stapleton, United States Circuit Judge for the Third Circuit, sitting by designation.

> Whether the district court correctly determined that appellant's motion to vacate, filed pursuant to 28 U.S.C. § 2255, was untimely under the one-year statute of limitations provision in the Antiterrorism and Effective Death Penalty Act of 1996.

We now conclude Appellant's indirect attack on his federal sentence was untimely, and we therefore affirm.

I. BACKGROUND

Between 1983 and 1994, Appellant pled guilty to several state criminal charges. In 1994, he was indicted as one of five co-defendants on federal drug conspiracy charges, and he pled guilty. A pre-sentence investigation report recommended classifying him as a career offender based on his prior state convictions. Initially, Appellant objected to being classed as a career offender without explaining the basis for his objection. At his sentencing hearing, however, counsel for Appellant advised the district court that Appellant wished to waive all of his objections to the pre-sentence investigation report. Appellant was sentenced as a career offender and received 188 months' imprisonment.

Appellant then filed a direct appeal, contending his prior state convictions were obtained in violation of his constitutional right to counsel, and he therefore should not have been sentenced as a career offender. On December 22, 1995, we affirmed Appellant's sentence. Our unpublished order included the following caveat in a footnote: "We note in passing that, should appellant obtain at some future date the vacation of the state court conviction[s] in question because they were obtained in violation of his constitutional rights, he could petition the district court under 28 U.S.C. § 2255 for the relief he now asks us to provide." *United States v.*

Johnson, No. 94-9402 (11th Cir. Dec. 22, 1995). Appellant sought certiorari from the Supreme Court of the United States, but the Supreme Court denied his petition on April 22, 1996. *Johnson v. United States*, 517 U.S. 1162, 116 S. Ct. 1559 (April 22, 1996) (mem.).

Just over one year later, on April 25, 1997, Appellant filed a motion in the district court to extend the time to file a § 2255 petition. The district court ruled that Appellant's motion was untimely under § 2255 ¶ 6(1). The district court did acknowledge the possibility that exists in every habeas case, namely, that something might transpire that would permit Appellant to take advantage of one of the later accrual dates under § 2255 ¶ 6. It therefore denied Appellant's motion without prejudice.

On February 6, 1998, Appellant filed a state habeas petition challenging all of his prior state convictions on the ground that he had not validly waived his right to counsel in those proceedings. On October 24, 2000, the state court vacated Appellant's prior convictions. Appellant then filed the present § 2255 petition on February 13, 2001, asking the district court to vacate his sentence because he no longer qualified as a career offender. On August 1, 2001, the district court denied the § 2255 petition as untimely. We granted a certificate of appealability, and this appeal followed.[1]

[1] We subsequently appointed counsel to represent Appellant for this appeal.

II. DISCUSSION

As this case involves an indirect challenge to a federal sentence via a collateral attack on prior state convictions, some background on the law of such challenges is helpful.

First, in *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732 (1994), the Supreme Court held that, during his sentencing proceeding, a federal prisoner could not attack the validity of his prior convictions that raised his maximum sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e); the only exception to this rule is for prior convictions based on a deprivation of the right to counsel under *Gideon v. Wainwright*. *See Custis*, 511 U.S. at 496; 114 S. Ct. at 1738.

Second, federal prisoners generally cannot attack prior convictions which enhanced their federal sentences in a § 2255 proceeding challenging the validity of their federal sentence. *Daniels v. United States*, 532 U.S. 374, 376, 121 S. Ct. 1578, 1580 (2001); *see also Lackawanna County District Attorney v. Cross*, 532 U.S. 394, 403-04, 121 S. Ct. 1567, 1574 (2001) (reaching same conclusion for § 2254). If a prior conviction used to enhance a federal sentence is no longer itself open to direct or collateral attack, the defendant is generally without recourse. *Daniels*, 532 U.S. at 382, 121 S. Ct. at 1583.

Following *Custis*, many Circuits including our own have authorized indirect attacks on federal sentences; a defendant may seek to reopen his federal sentencing pursuant to § 2255 if he has successfully attacked a prior state conviction used to enhance his federal sentence. *United States v. Walker*, 198 F.3d 811, 813 (11th Cir. 1999) (per curiam) (citing cases). The effect of these rules has been to redirect challenges to

federal sentences from federal courts to state courts, where court records may have been destroyed and where state executive officials often have no interest in defending a conviction for which the defendant has already served his sentence.

With this background in mind, we turn to Appellant's arguments on appeal.

A. Statute of Limitations

Appellant first argues his § 2255 petition, filed February 13, 2001, was timely under 28 U.S.C. § 2255 ¶ 6(4). That section provides as follows:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> . . . .
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255 ¶ 6. Appellant's argument is straightforward: the single "fact" supporting the claim in his § 2255 petition is the vacatur of his prior state convictions; absent those state convictions, Appellant should not have been sentenced as a career offender, and his federal sentence should be vacated. Appellant contends the "fact" supporting his § 2255 claim—the vacatur of his prior state convictions—could not have been discovered until October 24, 2000, the date on which the state court entered its order. He therefore reasons his § 2255 petition, filed on

February 13, 2001, was within one year of October 24, 2000, and thus within the AEDPA statute of limitations.

The question we must answer is whether the vacatur of a state conviction constitutes a "fact" within the meaning of § 2255 ¶ 6(4). Ordinarily, a federal prisoner must file his § 2255 petition within one year of the date on which his judgment of conviction becomes final.[2] Because an indirect collateral attack is predicated on a successful challenge to prior state convictions used to enhance the federal sentence, it is at least plausible to argue that a petitioner has one year from the date his prior state convictions were set aside, under § 2255 ¶ 6(4).

Common sense, however, dictates that we distinguish legal propositions and results from the "facts" referred to in § 2255. A factual proposition is typically something capable in principle of falsification (or possibly even verification) by some empirical inquiry, while a legal proposition is identified by consulting some authoritative legal source. If we are asked whether Appellant's prior state convictions have been vacated, we would consult an authoritative legal source: the records of decisions of the state court where Appellant collaterally attacked those convictions. On the other hand, if we are asked whether Appellant waived his right to counsel before pleading guilty to the state charges, we would need to make an empirical inquiry into the matter, for example by

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[2] AEDPA's statute of limitations applies somewhat differently to a petitioner, like Appellant, whose conviction became final prior to the effective date of AEDPA. Like all other circuits to have considered the issue, we allow such petitioners a one-year grace period until April 23, 1997, to file a § 2255 petition. *See Goodman v. United States*, 151 F.3d 1335, 1337 (11th Cir. 1998).

reading the extant records of Appellant's plea hearings.[3] Put another way, the vacatur of prior state convictions is a court action obtained at the behest of a federal prisoner, not "discovered" by him. *Brackett v. United States*, 270 F.3d 60, 68 (1st Cir. 2001). Applying the common sense distinction between the factual and the legal to § 2255 ¶6(4), we conclude the vacatur of Appellant's prior state convictions is not a "fact" from which the one-year statute of limitations may run.

This common sense reading of the phrase "facts supporting the claim or claims" is bolstered by comparing that accrual date with the other accrual dates in § 2255. Section 2255 ¶ 6(1) refers to the date a judgment becomes final, and § 2255 ¶6(3) refers to the date a right was initially recognized by the Supreme Court. The use of the term "facts" in § 2255 ¶ 6(4) is in contrast to those other subsection's use of "judgments" and "rights," two legal results distinct from historical facts. *See Brackett*, 270 F.3d at 68-69. It follows that the state court's vacatur of Appellant's prior convictions is not a "fact" within the meaning of § 2255 ¶ 6(4).

The interpretation of § 2255 ¶ 6(4) urged by Appellant is also inconsistent with the parallel habeas provision that applies to state prisoners, § 2244(d)(1). Under § 2244(d)(1)(D), the one-year limitation period runs from

[3] Of course, the passage of time may make an empirical inquiry difficult or impossible. *See Lackawanna County*, 532 U.S. at 403, 121 S. Ct. at 1574 ("As time passes, and certainly once a state sentence has been served to completion, the likelihood that trial records will be retained by the local courts and will be accessible for review diminishes substantially."). The possible harm from delay further bolsters our narrower interpretation of AEDPA's statute of limitations.

"the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Were we to adopt Appellant's interpretation of § 2255 and apply it to the parallel provision in § 2244, we would render redundant the word "factual" in § 2244, because all such predicates would be functionally "factual" in nature.

Others of our sister Circuits have interpreted "factual predicate" in § 2244 to mean historical facts, not court rulings or legal consequences. *See Hasan v. Galaza*, 254 F.3d 1150, 1154 & n.3 (9th Cir. 2001); *Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000); *Ybanez v. Johnson*, 204 F.3d 645, 646 (5th Cir. 2000) (per curiam) (characterizing as an "extraordinary proposition" the argument that "the factual predicate of their claim consists neither of evidence nor events that happened at trial but in the state court's ruling on their constitutional claims"). As the Supreme Court commonly interprets § 2254 and § 2255 in light of each other, *see Lackawanna County*, 532 U.S. at 402, 121 S. Ct. at 1573, we interpret the limitations period of § 2255 consistently with the limitations period of § 2244. *See Brackett*, 270 F.3d at 69 ("Because § 2254 (habeas corpus from state convictions) and § 2255 (post-conviction relief from federal convictions) are analogous to one another, the way the state habeas provisions are interpreted should be used to interpret § 2255(4).").

Finally, Appellant's interpretation of § 2255 ¶ 6(4) is contrary to the clear legislative purpose of AEDPA. It is generally accepted that one of the principal functions of AEDPA was to ensure a greater degree of finality for convictions. *See Duncan v. Walker*, 533 U.S. 167, 178, 121 S. Ct. 2120, 2127 (2001); *Williams v. Taylor*, 529 U.S. 420, 436, 120 S. Ct. 1479, 1490 (2000); *Jones v. United States*, 304 F.3d 1035, 1039 (11th Cir. 2002) ("A fundamental

purpose for the AEDPA was to establish finality in post-conviction proceedings."); *Brackett*, 270 F.3d at 69 ("[O]ne of the signal purposes animating AEDPA is the desire of Congress to achieve finality in criminal cases, both federal and state."). Given the other substantial grounds for interpreting § 2255 ¶ 6(4) as we do, we cannot accept an alternative interpretation that would also run directly counter to the general congressional intent behind AEDPA and indefinitely extend the opportunity for post-conviction challenges.

Our view thus accords with that of the First Circuit. *See Brackett*, 270 F.3d at 68.[4] In *Brackett*, the petitioner pled guilty to federal criminal charges in July 1997, and he was sentenced as a career offender based on two prior state convictions. *Id.* at 62 His federal sentence became final on March 12, 1998. *Id.* On January 3, 2000, he filed motions in state court to vacate his prior state convictions on the ground that he was denied effective assistance of counsel. *Id.* at 63. The state prosecutor's office agreed to the motions, and his prior state convictions were vacated without any judicial finding of a constitutional violation. *Id.* On December 18, 2000, the petitioner then filed a § 2255 petition to set aside his federal sentence. *Id.* at 62. Like Appellant, he claimed that his § 2255 petition was within one year of the vacatur of his state convictions, so that under § 2255 ¶ 6(4), his petition was timely. *Id.* at 64. The First Circuit disagreed, concluding "the operative date under § 2255(4) is not the date the state conviction was vacated, but rather the date on which the defendant learned, or with due diligence should have learned,

[4] We have previously cited *Brackett* approvingly. *See Jones*, 304 F.3d at 1039.

the facts supporting his claim to vacate the state conviction." *Id.* at 68.

We recognize that the Fourth Circuit has recently disagreed with *Brackett*, *see United States v. Gadsen*, 332 F.3d 224 (4th Cir. 2003), but we respectfully differ with our sister circuit's interpretation of § 2255 ¶ 6(4).[5] In *Gadsen*, the petitioner pled no contest to a South Carolina assault charge on February 27, 1997. *Id.* at 225. On December 3, 1997, he was convicted in federal court of two federal crimes, and based in part on his February 1997 state conviction, was sentenced as a career offender. *Id.* On January 7, 1998—less than one year after his state conviction, merely a month after his federal conviction, and well before his federal conviction became final following appeal on June 1, 1999—the petitioner filed a petition in South Carolina state court for post-conviction relief from his state conviction. *Id.* On December 20, 1999, the South Carolina court granted his application for post-conviction relief, and the South Carolina Supreme Court declined to review that decision on January 10, 2001. *Id.* at 225-26. With this final order vacating his state conviction in hand, the petitioner filed a § 2255 petition on December 17, 2001, seeking to vacate his federal sentence on the ground that he was no longer a career offender. *Id.* at 226 The district court, however, dismissed his § 2255 petition as untimely. *Id.*

[5] As we explain *infra*, Part II.B, we would reach the same result as the Fourth Circuit in *Gadsen* on the facts as they appeared in that case, but we would do so on the basis of equitable tolling, not statutory construction. On the equitable tolling issue, however, Appellant's case is materially different from *Gadsen*.

On appeal, the Fourth Circuit rejected *Brackett's* interpretation of § 2255 ¶ 6(4), treating the South Carolina court's vacatur of the petitioner's state conviction as a "fact" within the meaning of that section. In particular, the Fourth Circuit relied upon a passage of the Supreme Court's opinion in *Daniels* in which the Court acknowledged that "after an enhanced federal sentence has been imposed . . ., the person sentenced may pursue any channels of direct or collateral review still available to challenge his prior convictions." *Id.* at 228 (quoting *Daniels,* 532 U.S. at 382, 121 S. Ct. at 1583). The Fourth Circuit reasoned that, if it did not interpret § 2255 ¶ 6(4) liberally, "we would be punishing Gadsen and other litigants like him for having faithfully followed these instructions [from *Daniels*]." *Id.*

We think the Fourth Circuit reads the language of *Daniels* for much more than it is worth. To be sure, "[t]he entire point of *Custis* and *Daniels* was that litigants should not bypass state courts to litigate the facts underlying their state convictions during challenges to a federal sentencing determination." *Id.* But as the First Circuit aptly put it in *Brackett*, *Custis* and *Daniels* answer the question of *where* a federal prisoner may bring an attack on a prior state conviction in order to mount an indirect attack on a federal sentence, while the question in this case (as in *Brackett* and *Gadsen*) is *when* that indirect attack may be brought. *See Brackett*, 270 F.3d at 66. The language of *Daniels* on which the Fourth Circuit relies merely outlines the procedure that a federal prisoner must follow to bring an indirect attack on his federal sentence. The "when" question was not present in *Daniels*, so the Supreme Court did not address it and the relevant passage of *Daniels* does not speak to the time limits that apply. The Fourth Circuit reads the Supreme Court's silence on this issue as dictating one interpretation of § 2255 ¶ 6(4) when it does no such thing. *Cf. Barnhart v. Walton,* 535 U.S. 212, ___, 122 S. Ct. 1265,

1270, 152 L. Ed. 2d 330 (2002) ("[S]ilence, after all, normally creates ambiguity. It does not resolve it.").[6]

Thus, we hold with the First Circuit and *contra* the Fourth Circuit that the purported "fact" of a state court's vacatur of a federal prisoner's prior state convictions is not a "fact supporting the claim or claims" under § 2255 ¶ 6(4) from which AEDPA's statute of limitation will run. In this case, Appellant knew all of the facts supporting his challenge to his state convictions before his federal conviction became final. On direct appeal, he attempted to argue his prior state convictions had been obtained in violation of his right to counsel, and it is probable that this was the unstated basis for his initial objection to the pre-sentence investigation report that Appellant withdrew at his sentencing hearing. Appellant was therefore aware of all the relevant operative facts before his conviction became final. Absent some basis for equitable tolling, discussed *infra*, he had to file his § 2255 motion within the one-year grace period following AEDPA's enactment, or by April 23, 1997. Appellant did not file his present § 2255 petition until February 13, 2001, so we conclude his petition was untimely under AEDPA.

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[6] We do not mean to suggest that the "when" question is entirely irrelevant to the "where" question the Supreme Court answered in *Daniels*. *Daniels* would make little sense if, in many ordinary cases, a petitioner seeking to make an indirect attack would find himself permanently shut out of federal court when he brings his § 2255 petition. As we explain *infra*, however, equitable tolling may be available to a petitioner who acts with the requisite diligence in bringing an indirect attack on his federal sentence. *See infra* Part II.B. The availability of that equitable remedy helps to render the procedure outlined in *Daniels* fair and just.

B. Equitable Tolling

Appellant also argues he is entitled to equitable tolling of the AEDPA statute of limitations. We have held that equitable tolling is appropriate when a prisoner's § 2255 petition is untimely because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence. *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1286 (11th Cir. 2002); *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999). We have emphasized, however, that equitable tolling applies only in truly extraordinary circumstances. *Jones*, 304 F.3d at 1039-40; *Drew*, 297 F.3d at 1286. Appellant bears the burden of establishing that he is entitled to this extraordinary relief. *See Helton v. Sec'y for Dep't of Corr.*, 259 F.3d 1310, 1313-14 (11th Cir. 2001).

On the facts of this case, Appellant cannot show that the delay in filing his initial § 2255 petition was the result of extraordinary circumstances that were beyond his control even with the exercise of due diligence. Appellant was plainly aware of whatever facts supported his collateral attack on his prior state convictions at the time his federal sentence became final in 1996. He did not commence his challenge to the state convictions until February 1998, nearly two years later. Had Appellant been acting with due diligence, he would have attacked his state convictions immediately after his federal sentence became final, or perhaps even before he was sentenced on the federal offense. Yet Appellant has not even proffered any explanation or excuse that might show why the delay in attacking his underlying state convictions was beyond his control.

By way of comparison, Appellant has even less of a claim for equitable tolling than the petitioner in *Sandvik*. In that case, the petitioner's lawyer mailed his § 2255 petition from

Atlanta to the district court in Miami on April 18, 1997. *Sandvik*, 177 F.3d at 1270. The district court file-stamped the motion on April 25, 1997. *Id.* Because the petitioner's conviction was final prior to the effective date of AEDPA, his § 2255 motion was due no later than April 23, 1997, in accord with the one-year grace period following the enactment of AEDPA. *Id.* Thus, despite counsel's attempt to meet the deadline, the petition was untimely. When petitioner argued for equitable tolling on appeal, we concluded that petitioner's counsel could have mailed the petition earlier or used a private delivery service or a private courier to be certain that it was timely filed. *Id.* at 1272. As it was not a circumstance beyond petitioner's control with the exercise of due diligence, we found no ground for equitable tolling. *Id.* Unlike the petitioner in *Sandvik*, who at least attempted to file a petition within the one-year grace period, Appellant made no similar attempt to act diligently in this case. Rather, he did not even file the state post-conviction challenges on which his § 2255 petition was predicated until nearly two years after his federal conviction became final, despite knowing the basis for those state challenges at the time of his conviction. This is therefore hardly an extraordinary case in which petitioner was unable to meet the deadline through no fault of his own.

Appellant attempts to rescue his argument for equitable tolling by pointing to his April 25, 1997 motion in federal district court seeking to extend the time to file his § 2255 petition. Appellant claims the district court's denial of that motion without prejudice led him believe that he could still file a § 2255 petition at a later date. Yet the district court's order dismissing Appellant's 1997 motion found it to be untimely under § 2255 ¶ 6(1), and it only suggested that he could subsequently file a § 2255 petition if he could establish one of the later accrual dates set forth in § 2255 ¶ 6. As

explained *supra*, however, Appellant cannot come within § 2255 ¶ 6(4) to establish a later accrual date.

Appellant also points to the footnoted caveat in our opinion affirming his sentence on direct appeal, claiming the caveat misled him into thinking § 2255 relief would be available whenever he successfully attacked his state convictions. Nothing in our caveat suggested that Appellant could take an unlimited time to commence his collateral attack on his state convictions.[7] In addition, our opinion affirming his conviction issued prior to the effective date of AEDPA; the caveat may not have contemplated the effect of the new AEDPA limitations period. Following the enactment of AEDPA, Appellant still had the entire one-year grace period within which to take *some* action to attack his conviction and sentence, yet he did nothing.

This is the fundamental problem that plagues Appellant's argument: the long delay before he commenced his state collateral attacks. *Drew* presented a somewhat similar scenario. In that case, the petitioner filed a timely § 2254 petition, which the district court dismissed without prejudice while ordering the petitioner to first file a third state motion for post-conviction relief. *See Drew*, 297 F.3d at 1287. Though the petitioner complied with the district court's order, we concluded that equitable tolling was not warranted in that

[7] In this respect, our caveat is like the passage of *Daniels* that the Fourth Circuit over-emphasizes; our statement, like the Supreme Court's statement in *Daniels*, says nothing about the applicable time limits for an indirect attack. This is not surprising, since our caveat was explicitly noted "in passing." One cannot infer from such a passing statement how the background statute of limitations would apply to Appellant when he finally got around to bringing his indirect attack on his federal sentence.

case in part because the petitioner delayed filing the state motion. *Id.* If the timeliness of that petitioner's initial § 2254 petition did not justify equitable tolling because of his subsequent delay, it is impossible to find any justification for equitable tolling in this case, where Appellant's initial motion was not even timely in the first place.

The facts of *Gadsen* are usefully illustrative on this point. The petitioner in *Gadsen* collaterally attacked his prior state conviction in state court before his federal conviction and sentence were even final. *Gadsen*, 332 F.3d at 225. His state collateral attack was pending in the South Carolina courts for three years, until he ultimately prevailed. *Id.* at 226. If that petitioner were not given the benefit of equitable tolling, then under our interpretation of § 2255 ¶ 6(4), he would be precluded from carrying out his indirect attack for no other reason that the state courts' delay. Such a result would obviously be unfair. Under our circuit precedents, however, we would readily conclude the South Carolina courts' delay in finally disposing of the petitioner's state collateral attack amounted to an extraordinary circumstance beyond the petitioner's control. And because the petitioner launched his challenge in the South Carolina state courts before his federal conviction was final, there can be no doubt as to the petitioner's diligence in pursuing his claims. Thus, while we depart from the Fourth Circuit's opinion on the issue of statutory interpretation, *see supra* part II.A, on the facts of *Gadsen* we would ultimately reach the same result as our sister circuit by allowing that petitioner equitable tolling.

The facts of the present petition, however, are materially different from those in *Gadsen*; the crucial point here is that Appellant did nothing during the one-year AEDPA grace period to attack his prior state convictions collaterally. Unlike the petitioner in *Gadsen*, Appellant did not commence his

state collateral attack until almost two years after his federal sentence became final, and then nearly one year after AEDPA's one-year grace period expired. Given that delay, we are compelled to find there are no extraordinary circumstances in Appellant's case, nor can we conclude that Appellant acted with appropriate diligence. We cannot allow equitable tolling of the AEDPA limitations period on the facts of this case.[8]

III. CONCLUSION

We hold the vacatur of Appellant's prior state convictions is not a "fact supporting the claim or claims" within the meaning of 28 U.S.C. § 2255 ¶ 6(4). Under the statute of limitations that applies to § 2255 petitions, Appellant's petition was therefore untimely. Further, we hold Appellant cannot show, on the facts of this case, that his petition was untimely because of extraordinary circumstances beyond his

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[8] In a final effort to get the benefit of equitable tolling, Appellant claims the denial of equitable tolling would be unconstitutional suspension of the writ of habeas corpus. We have already held that the AEDPA limitations periods do not *per se* constitute a suspension of the writ. *See Tinker v. Moore*, 255 F.3d 1331, 1334 (11th Cir. 2001); *Wyzykowski v. Dep't of Corr.*, 226 F.3d 1213 (11th Cir. 2000). Appellant's argument therefore fails.

In addition, we do not reach Appellant's further argument–raised for the first time on appeal–that the failure to reach the merits of his § 2255 petition would amount to a miscarriage of justice. Arguments not raised in the district court are waived. *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998) (per curiam).

control and unavoidable even with the exercise of due diligence. He therefore is not entitled to equitable tolling.

AFFIRMED.

RONEY, Circuit Judge, dissenting:

I respectfully dissent. In my judgment, Johnson's February 13, 2001 § 2255 petition for writ of habeas corpus should not have been dismissed as untimely because the one-year statute of limitation on the claim asserted did not begin to run until October 24, 2000, the date the state court vacated Johnson's July 5, 1989 state conviction for distribution of cocaine - one of the two prerequisite state convictions relied upon by the district court to enhance Johnson's sentence under the career offender category of the Sentencing Guidelines.

Contrary to the Court's opinion, I think a decision of a state court reversing a state criminal conviction is a "fact" within the meaning of 28 U.S.C. § 2255 ¶ 6(4). *See United States v. Gadsen*, 332 F.3d 224, 229 (4th Cir. 2003) (holding that "the federal statute of limitations begins running when the state court conviction is conclusively invalidated"); *United States v. Hoskie*, 144 F. Supp.2d 108, 111 (D. Conn. 2001) (holding that "the one-year statute of limitations starts to run on the date the state convictions are vacated, not an earlier date when the defendant discovered the facts forming the basis for the attack on the state convictions").

With this Court's decision and the decision in *Brackett v. United States*, 270 F.3d 60, 68 (1st Cir. 2001) (holding that "the operative date under § 2255(4) is not the date the state conviction was vacated, but rather the date on which the defendant learned, or with due diligence should have learned, the facts supporting his claim to vacate the state conviction"), there is a clear split in the circuits, which at some point should be resolved by Congress or the Supreme Court. Without question, if the rule announced in this decision and in *Brackett* is consistently applied, in some circuits there will be defendants serving time in federal prison under a federal

sentence based upon conviction of a state crime that the state court has authoritatively held the defendant unquestionably did not commit, who would be barred from relief, while in other circuits relief from such imprisonment will be readily available.

The relevant section, 28 U.S.C. § 2255 ¶ 6(4), provides:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> . . . .
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

As a "fact" within the meaning of this section, it is obviously new and not previously discoverable because until the state court actually entered the judgment reversing seven outstanding convictions, including Johnson's July 5, 1989 conviction, it had yet to happen and therefore, by definition, could not be a fact at all. *See* Black's Law Dictionary 610 (7th ed. 1999) (defining "fact," "1. Something that actually exists"); Webster's Third New International Dictionary 813 (1993) (defining "fact," "1: a thing done"); The American Heritage Dictionary of the English Language 46 (1975) (defining "fact," "1. something known with certainty"); Black's Law Dictionary 738 (3d ed. 1933) (defining "fact," "1- a thing done"); *see also United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (en banc) ("Where the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it

said."). Until that date, the fact was that Johnson stood convicted of those numerous crimes. The fact that he does not now stand convicted of those crimes clearly supports his claim because: (1) those seven vacated convictions were relied upon by the sentencing court in one way or another in deriving Johnson's total offense level of 25 and a criminal history category of 6; and (2) only *one* of the two required convictions relied upon by the district court to enhance Johnson's sentence as a career offender was a valid conviction. Without Johnson's vacated July 5, 1989 state conviction for distribution of cocaine, the undeniable fact is that he was not a career offender within the meaning of the Sentencing Guidelines. *See, e.g.*, *United States v. Duty*, 302 F.3d 1240, 1241 (11th Cir. 2002) (noting that a defendant is a "career offender" under the Sentencing Guidelines if, *inter alia*, "the defendant has at least two prior felony convictions for either a crime of violence or a controlled substance offense"); U.S.S.G. § 4B1.1. The sentencing court did not rely upon the underlying conduct that resulted in those convictions, but instead simply relied upon the mere fact that those were valid state court convictions, as recited in the Presentence Investigation Report ("PSI").

Johnson's PSI indicates a total offense level of 25 and a criminal history category of 6, qualifying him for a sentencing range of 110 to 137 months' imprisonment. *See* U.S.S.G. Ch. 5, Pt. A. The district court, however, relied upon the "facts" of *two* prior state convictions to boost Johnson into the career offender category and thus increase his sentence: (1) a July 5, 1989 conviction for distribution of cocaine; and (2) a November 13, 1989 conviction for sale of cocaine. Utilizing the career offender enhancement, the district court enhanced the total offense level from 25 to 32 with a criminal history category of 6, qualifying Johnson for a sentencing range of 151 to 188 months' imprisonment. *See id.* § 4B1.1(b). The

district court sentenced Johnson to 188 months' imprisonment, the highest end of that sentencing range. *See id.* Ch. 5, Pt. A.

As a timely petition, the case should be remanded for the district court to consider Johnson's claims on the merits. If that petition is granted and a resentencing is ordered, Johnson may indeed be faced with some new problems.

Johnson's state petition did not assert that he was innocent of the facts which supported his conviction, but simply alleged that although he pled guilty in each case, the convictions were nonetheless invalid because he did not affirmatively waive his right to counsel. The state made no genuine attempt to defeat his claim, perhaps because Johnson had already served the state prison sentences accompanying those state convictions. This lack of defense to the state petitions is reflected in the state court's opinion, which leaves some doubt as to whether Johnson met the *Strickland* standard for relief from a claim of ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The state court's opinion reads as follows:

> Petitioner, after being sentenced to an enhanced sentence because of certain state convictions, filed his Petition for Writ of Habeas Corpus alleging that his pleas in seven cases in Cook County Superior Court were not voluntary in that he did not knowingly, intelligently and voluntarily waive his right to counsel at the hearing on the entry of his guilty pleas. The cases that were challenged by Petition were numbered 83F-9 [Feb. 11, 1989 - burglary], 88F-32 [Mar. 9, 1988 - conversion], 88M-43 [Mar. 9, 1988 - contempt], 89F-122 [July 5, 1989 - distribution of cocaine], 90F-383 [Dec. 5, 1990 - theft and violation

of probation], 92F-36 [Mar. 11,1992 - possession of cocaine] and 93F-148 [April 21, 1993 - possession of cocaine] filed in Cook County Superior Court.

Petitioner . . . filed copies of the plea petitions that accompanied the entry of his pleas. These pleas contained questions about his waiver of the presence and use of an attorney.

The State responded denying the allegations but have not filed any further transcripts of the hearing which would support their position.

This Court findings that the record in these cases does not show an affirmative waiver of his right to an attorney. . . .

> IT IS HEREBY ORDERED that Petitioner's Petition For Writ of Habeas Corpus is hereby GRANTED and the convictions in the above-cited cases are hereby reversed.

Regardless of the ground for the decision, this state court judgment reversed those convictions, and they are no longer valid convictions upon which a sentencing court could rely. That state court judgment is entitled to the same fact analysis as if the convictions had been reversed on the basis of irrefutable evidence that a defendant was in fact innocent of the crimes for which he had been convicted. If the state court's vacatur of the seven state convictions came before the sentencing in this case, it would have been clear error for the court to rely on the fact of conviction. Without those convictions to rely upon, an analysis of Johnson's PSI would show: (1) only three criminal history points derived from Johnson's November 13, 1989 sale of cocaine conviction,

corresponding to an offense level of 25 and a criminal history category of 2; and (2) an insufficient number of prior offenses (one) to support a career offender enhancement.

At the time of sentencing, the PSI properly noted that U.S.S.G. § 4A1.3 provides that a sentencing court may depart upward if "reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." U.S.S.G. § 4A1.3. This Court has affirmed several circumstances where a district court applied an upward departure under § 4A1.3. *See, e.g.*, *United States v. Jones*, 289 F.3d 1260 (11th Cir. 2002) (two-level criminal history category upward departure for a defendant's prior juvenile offenses and other offenses too remote to use in calculating a criminal history under the guidelines); *United States v. Hernandez*, 160 F.3d 661 (11th Cir. 1998) (one-level criminal history category upward departure for a defendant's prior non-criminal misconduct related to the sentenced offense); *United States v. Spraggins*, 868 F.2d 1541 (11th Cir. 1989) (three-level criminal history upward departure for defendant with history of molesting children, the need to deter such conduct in the future, and to account for defendant's older previous crimes); *United States v. Dorsey*, 888 F.2d 79 (11th Cir. 1989) (upheld district court's upward departure to a career offender, even though defendant did *not* have two qualifying prior felony convictions under 4B1.1).

Based on the information contained in the PSI, it may well be that a departure upward would be appropriate, but these are matters not before us at this time. The sole issue before us is whether Johnson's § 2255 petition is timely because it was filed within one year of the Georgia state court's vacatur of Johnson's seven prior state convictions. I would hold that it

was timely, would reverse the decision of the district court to the contrary, and would remand to the district court for consideration of the petition on its merits.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 01-14830
District Court Docket No.
01-00014-CV-WDO-7

[Filed August 5, 2003]

ROBERT JOHNSON, JR.,	)
Petitioner-Appellant,	)
	)
versus	)
	)
UNITED STATES OF AMERICA,	)
Respondent-Appellee.	)

Appeal from the United States District Court
for the Middle District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: August 5, 2003
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 01-14830
D.C. Docket No. 01-00014-CV-WDO-7

[Filed December 22, 2003]

ROBERT JOHNSON, JR.,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION FOR REHEARING EN BANC

Before EDMONDSON, Chief Judge, TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS and WILSON, Circuit Judges.

ORDER:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition for Rehearing En Banc is DENIED.

/s/ J.L. Edmondson
CHIEF JUDGE

BARKETT, Circuit Judge, dissenting from the denial of rehearing en banc:

I believe the issue in this case merits en banc consideration. The panel-majority holds that when a federal court bases an enhanced sentence on a state conviction, the subsequent state vacatur of that very same conviction is not a fact supporting a prisoner's habeas claim that his sentence should be reduced accordingly. I do not believe the panel-majority's statutory interpretation of 28 U.S.C. § 2255 ¶ 6(4) (2003) is supported by law or logic. On the contrary, I believe that Judge Roney's dissent and Judge Wilkinson's opinion for the Fourth Circuit[1] correctly explicate the relevant law.

It is axiomatic that courts must give words their ordinary meaning. United States v. Steele, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc) ("Where the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said."). The ordinary meaning of "fact" refers to "a thing done" that can be "known with certainty."[2] In this case, the vacatur of state conviction is a fact because it is something that actually occurred and can be proven in support of Johnson's claim. However, the panel-majority concludes that a vacatur cannot be a fact because it comes from an authoritative legal source.

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[1] United States v. Gadsen, 332 F.3d 224 (4th Cir. 2003).

[2] See Webster's Third New International Dictionary 813 (1993) (defining 'fact,' '1: a thing done'); The American Heritage Dictionary of the English Language 46 (1975) (defining 'fact,' '1. something known with certainty'); Black's Law Dictionary 738 (3d ed.1933) (defining 'fact,' '1-a thing done').

Although distinctions are often made between the facts and the legal consequences of a case,[3] no metaphysical barrier prevents a legal consequence from sometimes operating as a fact. With regard to Johnson's federal habeas claim, the vacatur of his state court conviction is the operative fact that supports his claim, while a reduction in his sentence would be the possible "legal effect or consequence" of that fact.

The panel-majority suggests that the underlying state Gideon violations-and not the state vacaturs-are the facts that support Johnson's habeas claim. Simultaneously, the panel-majority asserts that the underlying constitutional claims would not have been sufficient to support a federal habeas claim, acknowledging that "[t]he entire point of Custis [v. United States, 511 U.S. 485 (1994)] and Daniels [v. United States, 532 U.S. 374, 382 (2001)] was that litigants should not bypass state courts to litigate the facts underlying their state convictions during challenges to a federal sentencing determination." Johnson v. United States, 340 F.3d 1219, 1225 (11th Cir. 2003). Thus, the panel-majority paradoxically asserts that federal courts are not the proper forum for litigating facts underlying a state conviction, but these very same facts can trigger the statute of limitations for federal habeas review.

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[3] See Webster's Third New International Dictionary 813 (1993) (defining "fact" as: "6 usu pl a: any of the circumstances of a case at law as it exists or is alleged to exist in reality: something proved by the evidence to be or alleged to be of actual occurrence b: the reality or events or things the actual occurrence or existence of which is to be determined by evidence."); American Heritage College Dictionary (1982) (defining "fact" as "the aspect of a case at law, comprising events determined by evidence as distinguished from interpretation of law: The jury made a finding of fact.").

The panel-majority also supports its interpretation by arguing that it promotes AEDPA's goal of finality. But that is not AEDPA's only goal. The Supreme Court has continually asserted that AEDPA is designed "to further the principles of comity, finality, and federalism." See, e.g., Woodford v. Garceau, 123 S. Ct. 1398, 1401 (2003); Duncan v. Walker, 533 U.S. 167, 178 (2001); Williams v. Taylor, 529 U.S. 420, 436 (2000). Often decisions will simultaneously promote all three of these principles. In many instances, the Supreme Court has extolled the virtues of finality because of its relation to comity.[4] However, in this case, the federal court poses no risk of disrupting the finality of a state action. The state itself has decided to vacate the conviction. The Supreme Court has stated that in the habeas context a federal court should not "deprive [a] state-court judgment of its normal force and effect." Daniels, 532 U.S. at 378. This is exactly what the

[4] See, e.g., Williams v. Taylor, 529 U.S. 420, 436 (2000) ("AEDPA's purpose to further the principles of comity, finality, and federalism . . . Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts. In keeping this delicate balance we have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings."); Coleman v. Thompson, 501 U.S. 722, 726 (1991) ("This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus"); McCleskey v. Zant, 499 U.S. 467, 493 (1991) ("[T]he doctrines of procedural default and abuse of the writ are both designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments.").

panel-majority does by stripping the state court of the ability to exculpate criminal defendants.

In summary, I believe that this particular litigant, who followed the instructions of the Supreme Court,[5] who followed the direct instructions of this Court,[6] who followed the proper instructions of the state and was able to have his state convictions timely vacated, and who probably relied on the plain language of § 2255 ¶ 6(4), is unfairly being denied his right to present his habeas petition.

[5] The Supreme Court has explicitly instructed prisoners to attack their convictions in state court. Daniels, 532 U.S. at 382 ("After an enhanced federal sentence has been imposed . . ., the person sentenced may pursue any channels of direct or collateral review still available to challenge his prior conviction."); Custis, 511 U.S. 485 (stating that a prisoner who was still in custody on his prior convictions could "attack his state sentences [in state court] or through federal habeas review").

[6] In this case, the result is even more cruel and unfair, since this Court has previously instructed this Appellant to do precisely what he has done. In a prior opinion affirming Johnson's sentence, we included the following caveat in a footnote: "We note in passing that, should Johnson obtain at some future date the vacation of the state court conviction[s] in question because they were obtained in violation of his constitutional rights, he could petition the district court under 28 U.S.C. § 2255 for the relief he now asks us to provide." United States v. Johnson, No. 94-9402, 73 F.3d 1108 (11th Cir. 1995).